

severe punishment, he may impose the full punishment authorised by law, provided he records his reason for so doing — so that in this particular case though the learned Magistrate only sentenced each of the three accused to a fine of \$900 or in default six months, he could if he had been so minded have sentenced each of them to three years' imprisonment.

A Magistrate should assume in most cases that the Public Prosecutor or his Deputy who has been associated with the investigation from an early stage would be quite content if the court were to sentence the accused up to the limit of its sentencing power, and a Magistrate should therefore be slow to conduct a preliminary enquiry and commit the accused for trial in the High Court. If a Magistrate feels strongly that the offence with which the accused is charged is serious, he can give expression to this feeling by imposing what he feels is the right sentence, rather than take action that might delay the proceedings and clog up the High Court.

In the instant case it is significant that originally the accused were charged under section 326 of the Penal Code but subsequently the prosecution reduced the charges to section 324. This shows that in the opinion of the Public Prosecutor each of the accused did not if convicted deserve more than three years. In the event each of them was only fined and there was no appeal by the prosecution against sentence.

For the above reasons we would answer the question referred to us in the negative.

*Question answered.*

Solicitors: *Mohamed Yaacob & Gomez.*

### N. B. MENON v. ABDULLAH KUTTY

[F.C. (Suffian L.P., Ali Hassan and Wan Sukeiman F.JJ.)  
August 17, 1974]

[Kota Bharu — Federal Court Civil Appeal No. 102 of 1973]

*Partnership — Partnership carrying on business in premises of which one of the partners was tenant — Whether partnership becomes tenant of the premises.*

In this case the appellant and the respondents were partners in running a restaurant in Kelantan. The respondent was the tenant of the premises but at the material time he was living far away in Johore and the appellant managed and ran the restaurant business. The respondent gave notice of the dissolution of the partnership to the appellant and subsequently gave the appellant notice to quit the shop. The appellant refused to do so and the respondent thereupon sued for vacant possession. The respondent succeeded in the High Court, whereupon the appellant appealed to the Federal Court. The sole issue on appeal was who in the circumstances of the case was the tenant of the shop, the respondent personally or the partnership.

**Held**, dismissing the appeal, on the facts of this case the respondent had not assigned the tenancy to the partnership and he was therefore entitled to have the premises back.

*Cases referred to:-*

- (1) *Asmabi v. Motilal Doshi* [1960] M.L.J. 195.
- (2) *Pocock v. Carter* [1912] Ch. 663.
- (3) *Gian Singh v. Devraj Nahar* [1965] 2 M.L.J. 12.

### A FEDERAL COURT.

*A. Wilson* for the appellant.

*Datuk H. L. Wrigglesworth* for the respondent.

**Suffian L.P.:** Mr. Abdullah Kutty the plaintiff was tenant of a shop No. 40 Jalan Market, Pasir Mas town, where he ran a restaurant known as the Noorjihan Restaurant. He had a partner in the business, N. B. Menon the defendant. At the material time the plaintiff was living far away in Johore and the defendant managed and ran this restaurant business. On 15th February, 1970, the plaintiff gave notice of dissolution of the partnership to the defendant. Fifteen days later he gave the defendant notice to quit the shop on 31st May, 1970. The defendant refused to vacate. The plaintiff sued for vacant possession in the High Court. He won judgment and the defendant appeals to us.

There were several issues in the High Court, but here before us there is only one issue, namely, who in the circumstances of this case was tenant of the shop, was it the plaintiff personally or was it the partnership? The plaintiff says that he in his personal capacity was the tenant, that all the defendant had was an implied licence to occupy the premises during the continuance of the partnership subject to the partnership agreement and that such licence was duly terminated by the notice to quit. The defendant on the other hand maintains that on the facts of this case and under the partnership agreement the partnership became tenant of the shop in place of the plaintiff and that when the plaintiff gave notice dissolving the partnership the defendant became a statutory tenant protected by the Control of Rent Act, 1966.

The facts established by the plaintiff and not criticized before us are as follows. On 14th July, 1965, the plaintiff and the two owners of the premises (Omar bin Haji Awang and his younger brother Abdul Rahman bin Haji Awang) entered into a tenancy agreement in respect of the shop for a period of ten years from 1st May, 1965, on a monthly rent of \$110 for the plaintiff to conduct business there "under whatever trade name" that he desires with the usual provision not "to assign, underlet or otherwise part with possession of the premises, or any part thereof to any person without the consent, in writing, of the first party (landlords)". The premises are rent-controlled premises. The plaintiff carried on his business under the trade name of Noorjihan Restaurant and on 8th February, 1967, he entered into a partnership agreement with the defendant, the relevant clauses of which read as follows:—

"2. The partnership shall be carried on as long as the partners desired with power to either partner to terminate the partnership at the expiry of three years, from the date of the commencement of the partnership as aforesaid by giving to the other partner not less than three (3) calendar months' notice in writing of his intention. Such notice may be left at the principal place of business of the partnership for the time being.

3. Unless and until otherwise determined by the partners the said business of the partnership shall be carried on at No. 40, Jalan Market, Pasir Mas, Kelantan aforesaid.

4. The capital of the partnership shall be \$6,000/- (Six thousand Dollars) to be contributed equally by the partners.

....

15. In the event of the partnership being dissolved by notice in the manner above set forth, the continuing partner shall purchase the share of the outgoing partner by paying to the outgoing partner the net value of his share and such payment shall be made in a lump sum on the last day of the said notice. The outgoing partner will not be eligible for payment in respect of goodwill of the said partnership business. For the purpose of this clause each partner shall do and execute all deeds, documents and things as may be found necessary in the circumstances."

Towards the end of October 1967 the plaintiff who had been managing the partnership business suddenly left for India and the defendant who up till then had been a sleeping partner took over its management. Though the plaintiff subsequently returned to this country and did not leave again for India until some time in 1971, he never returned to Pasir Mas and while he was staying and working in Segamat as a sundry goods shop assistant he gave Abdul Kadir son of Mohamed two powers of attorney, one on 7th January, 1970, and the other on 21st January, 1970. On 15th February, 1970, the plaintiff's solicitors sent to the defendant a notice of dissolution of the partnership, terminating the partnership on 31st May, 1970, in accordance with clause 2 of the partnership agreement and requesting him to take action for stock-taking and preparation of the partnership accounts as on 31st May, 1970. On 1st March, 1970, the plaintiff's solicitors sent to the defendant a notice to vacate the premises on or before 31st May, 1970. The defendant did not vacate the premises. During the continuance of the partnership the rents were paid from the partnership fund (except that for February 1970 which was paid by the plaintiff's attorney PW1) and in all cases the rent receipts were issued in the name of the plaintiff.

At the trial it was alleged that the defendant paid the plaintiff \$8,250 when he entered this partnership and that because of this consideration and other factors the plaintiff had assigned the tenancy to the partnership. As to this the learned trial judge found as a fact that no money had been paid by the defendant to the plaintiff.

He then considered the question whether, apart from this alleged payment which he had rejected, in the circumstances of this case an inference could nevertheless be drawn that the plaintiff had assigned the tenancy to the partnership, so that on the dissolution of the partnership the defendant became a statutory tenant and therefore protected under the Control of Rent Act, 1966.

After considering —

- (a) the law as found in —  
*Asmabi v. Motilal Doshi*,<sup>(1)</sup>  
*Pocock v. Carter*,<sup>(2)</sup>  
*Megarry's The Rent Acts*, 9th edition, pages 47-52,  
*Lindley on Partnership*, 12th edition, pages 359,  
 364, 365; and  
*Gian Singh v. Devraj Nahar*,<sup>(3)</sup> and
  - (b) the facts as found by him,
- the learned judge concluded that the plaintiff had not assigned the tenancy to the partnership.

With respect I agree with the learned trial judge.

Regarding property used for partnership purposes, or what shall be partnership property and what shall be

A separate property, *Lindley on Partnership*, Twelfth Edition, at page 359 states:

"Agreement the test

It is for the partners to determine by agreement amongst themselves what shall be the property of the firm, and what shall be the separate property of one or more of them. If there is no express agreement, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. Upon this subject there have been many decisions which will be alluded to hereafter, but the principal rules which may be deduced from the cases are now incorporated in sections 20 and 21 of the Partnership Act, 1890..."

and at page 365 states:

C "Property used for partnership purposes not necessarily partnership property

Again, it by no means follows that property used by all the partners for partnership purposes is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all. So it sometimes happens, though less frequently, that office furniture, and even utensils in trade, are the separate property of one of the partners, subject to the right of the others to use them as long as the partnership continues. If, however, a partner brings such property into the common stock as part of his capital it becomes partnership property, and any increase in its value will belong to the firm.

E As already observed, the only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agreement has been come to upon the subject. But this is by no means always an easy matter."

Earlier on at page 364 it is stated thus:

"It by no means follows that persons who are partners by virtue of their participation in profits are entitled as such to that which produces those profits."

F *Gian Singh & Co. v. Devraj Nahar & Others*<sup>(4)</sup> illustrates the application of the principle stated by *Lindley* that property used for partnership purposes is not necessarily partnership property. There the plaintiffs were chief tenants of a shophouse in Kuala Lumpur which they sublet to the defendant who ran on it a sports goods business known as Nahar & Co. In March 1958 the subtenant took two partners into his business. The plaintiffs sought to dispossess the subtenant on the ground that he had broken his covenant not to assign or sublet the premises without the plaintiffs' written consent which they had admittedly refused to give. The partnership agreement between the defendant and his two partners witnesses that the three of them "hereby mutually agree to become partners in the business of Nahar & Co. now carried on by 'the tenant' alone at No. 11 Mountbatten Road, Kuala Lumpur, for the period and on the terms hereinafter expressed."

The relevant terms are as follows:

I "5. Subject to the provision of these presents the partners shall be entitled to the capital and property for the time being of the partnership and to the goodwill of the business in equal shares.

6. The capital of the partnership shall consist of the net value of the stock-in-trade book debts and other assets of the business of Nahar & Co. heretofore carried on by Devraj at No. 11 Mountbatten Road, Kuala Lumpur, less the outstanding liabilities of that business and for purposes of computation the said assets shall be taken to be of the net value of \$30,000 which shall be credited to the three partners equally as their share of capital."

For the plaintiffs it was argued that the tenancy was one of the "other assets of the business of Nahar & Co." under clause 6, that the partners were under clause 5 "entitled to the capital and property for the time being of the partnership... in equal shares" and that the joint effect of the two clauses was to divest the tenant of his tenancy and to vest it in the partners, thus constituting an assignment. This submission was rejected by the Privy Council.

Their Lordships held that the fact that these excellent premises were an asset to the business does not bear on the question whether the tenancy was an asset of the business which was transferred to the partnership, and that the fact that the partners enjoyed the use of the entire premises was an obvious consequence of the partnership deed but does not decide the point at issue.

Lord Pearce, giving the advice of the Board, said at page 13—

"When one person is proprietor of a business the question which assets are included as assets of the business may not always be clear. There is no certainty that the tenant regarded his personal tenancy, albeit used by him as premises for carrying on the business, as an asset of the business, which passed with the business. And if, under the deed, the tenancy was being assigned to the partnership, one would certainly expect to find clearer provision with regard to it. The tenancy might have been dealt with by the tenant giving to his partners a licence to trade with him there or by his constituting himself a trustee for the partnership, or merely by giving the partners no express rights at all. From a practical point of view the incoming partners were, even if no arrangement at all was made about the premises, adequately protected by clause 4 which provided that the business should be carried on at the premises 'or at such other place or places as the partners may from time to time agree upon'."

I agree with the learned trial judge that like the partnership deed in *Gian Singh*,<sup>(4)</sup> the partnership agreement in this case contains no specific reference to the tenancy but merely states that the business shall be carried on at the said premises unless and until otherwise determined by the partners and it cannot therefore be inferred that the plaintiff has assigned his tenancy to the partnership. If under the deed the tenancy was being assigned to the partnership one would certainly expect to find clearer provision with regard to it. The fact that the partnership enjoyed the use of the premises and had exclusive possession are only consequences of the partnership agreement. All receipts for rent issued by the landlords were issued in the name of the plaintiff. That the defendant understood the implication of this is shown by the fact that he tried to amend some receipts to make them appear as if they were in favour of "Noorjihan Restaurant". The fact that rents, electricity and water charges were paid out of the partnership fund was not unexpected, because these charges were incurred for the benefit of the business. As in *Gian Singh*,<sup>(4)</sup> here too the tenancy agreement contained a provision against assignment; and there was no approach made to the landlords by the partners for an assignment of the tenancy to the partnership. Indeed the landlords were ignorant of the partnership arrangement between the two parties. It is true that the plaintiff himself had not come back to Pasir Mas, but that does not mean that he has abandoned the tenancy or assigned it. The fact that the plaintiff has accepted his half share of the

A business on dissolution of the partnership, does not imply that he has assigned the tenancy.

For the reasons given by the learned trial judge I agree that the decision in *Asmabai*<sup>(1)</sup> is peculiar to the facts of that case and is not applicable to the instant case.

B I would therefore dismiss this appeal with costs. The appellant's deposit to respondent against his taxed costs.

Ali and Wan Suleiman F.JJ. concurred.

*Appeal dismissed.*

C Solicitors: *Wilson & Co.; Wrigglesworth & Co.*

### JACOB v. OVERSEA-CHINESE BANKING CORPORATION, IPOH

D [F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Raja Azlan Shah F.J.) August 24, 1974]

[IpoH — Federal Court Civil Appeal No. 69 of 1974]

*Land Law — Charge of land to bank to secure payment of overdraft — Default in payment of principal and interest — Notice given in form 16D — Whether effective — National Land Code, ss. 253, 254 and 255.*

E In this case the appellant had charged his land to the respondent bank to secure the repayment of an overdraft. The charge was to cover an overdraft of \$6,000/- and for interest. On default of payment the respondent bank made a demand for payment by letter and subsequently served on the appellant a notice of default in the form of 16D prescribed by the National Land Code. The bank applied for an order that the land be sold by public auction and the application was allowed in the High Court. The appellant appealed and one of the grounds of appeal was that the notice should have been given in the form 16E.

**Held:** (1) the object of the legislature was to see that sufficient notice was given to the chargor before the chargee applied for an order of sale and in this case the chargee had given the chargor sufficient notice before coming to the court;

G (2) where there was a demand for payment of principal and interest, Form 16E could be used as well as Form 16D and the demand may be made by either form;

(3) the charge in this case was up to the limit of \$6,000/- for principal and the appellant was therefore entitled to get judgment only for the repayment of this sum as principal. As the respondent bank had not particularised what part of their claim for \$7,393.11 was for principal and what part for interest they should only get judgment for \$6,000/-.

H FEDERAL COURT.

*J. R. Devadas* for the appellant.

*Bala Mahesan* for the respondent.

I **Suffian L.P.:** On 16th August, 1966, the appellant (whom I shall refer to simply as the chargor) executed a charge in favour of the respondent bank (whom I shall refer to simply as the chargee) over his land to secure the repayment of an overdraft.

The relevant words of the charge read:

"I (chargor) proprietor of the land described below (hereinafter called the said land): for the purpose of securing the payment to the chargee . . . , with interest, the sums from time to time due to the said chargee by me . . . up to the limit hereinafter stipulated: